DOCUMENT RESUME

ED 370 491 HE 027 451

TITLE	Americans With Disabilities Act (ADA) and the Disabled Student in Medical School: Guidelines for Medical Schools.
INSTITUTION	Association of American Medical Colleges, Washington, D. C.
PUB DATE	Jun 93
NOTE	23p.
AVAILABLE FROM	Association of American Medical Colleges, 2450 N St., N.W., Washington, DC 20037-1126 (free).
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Accessibility (for Disabled); Access to Education; Accreditation (Institutions); Admission (School); *Compliance (Legal); *Disabilities; Educational Discrimination; Equal Education; *Federal Legislation; Guidelines; Higher Education; *Medical Schools; *Medical Students; Selective Admission
IDENTIFIERS	*Americans with Disabilities Act 1990; Civil Rights Restoration Act 1987; Rehabilitation Act 1973

ABSTRACT

This handbook provides an overview of the Americans with Disabilities Act (ADA) and aims to help medical schools to review and refine their institutional policies to conform with the ADA. The background section describes the 1973 Rehabilitation Act which prohibits discrimination solely on the basis of disability of an "otherwise qualified" person, the Civil Rights Restoration Act of 1987, and the ADA. This section also describes medical school policy development in response to these legislative actions. The handbook next cites relevant 1979 medical school accreditation standards regarding objectives, educational program, and medical students. A section on current legal requirements summarizes key points of the ADA. The following section looks in detail at admissions and treats the law's requirements concerning "essential functions" and "reasonable accommodation." Other sections examine student promotion and retention and procedures for school implementation. Appended is an annotated legal summary of the ADA, "The Americans With Disabilities Act" by Robert A. Burgoyne and Jacqueline R. Depew which describes the Act and addresses issues specific to colleges and universities, admissions issues, and enforcement. Contains an annotated listing of 18 relevant court cases. (JB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 370 491

ASSOCIATION OF AMERICAN MEDICAL COLLEGES

THE AMERICANS WITH DISABILITIES ACT (ADA)

AND THE DISABLED STUDENT IN MEDICAL SCHOOL:

Guidelines for Medical Schools

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Association of American Medical Colleges

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037

BEST COPY AVAILABLE

HE 027 451

THE AMERICANS WITH DISABILITIES ACT (ADA)

AND THE DISABLED STUDENT IN MEDICAL SCHOOL:

Guidelines for Medical Schools

Approved for Distribution, June, 1993
AAMC Executive Council

Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037-1126

INTRODUCTION

The Americans with Disabilities Act (ADA) [PL 101-336], enacted by Congress in 1990, has heightened public awareness of the needs and rights of persons with disabilities. This handbook provides an overview of the ADA and the antecedent Rehabilitation Act of 1973 (PL 93-112) and is intended to help medical schools as they review and refine their institutional policies. Important policy questions are discussed. Various approaches to the implementation of policy are suggested. An annotated legal summary, a bibliography and summary of relevant case law are included for a fuller understanding of the rights and needs of persons with disabilities and the responsibilities of medical schools.

BACKGROUND

The Rehabilitation Act of 1973 constitutes the primary non-discrimination law applicable to the admission and postsecondary education of disabled persons. Section 504 of this statute prohibits discrimination solely on the basis of the disability of an "otherwise qualified" person seeking admission to any college, university, or other institution of higher education. The Civil Rights Restoration Act of 1987 makes clear that individual units within a university are considered part of the university if any unit receives federal assistance. The ADA, enacted in 1990, extends this legal protection to employment and clarifies several aspects of Section 504.

In 1979, the AAMC convened a Special Advisory Panel on Technical Standards for Medical School Admission. The report of this panel was distributed to all medical schools as a guide for the development of individual school policies. The summary recommendations of the 1979 Advisory Panel were:[1]

> "The medical education process, which focuses so largely on patients, differs markedly from postsecondary education in fields outside the health sciences.
>
> "The primary responsibility for the selection of students and for the content of the curriculum rests with the medical school and its faculty.
>
> "The M.D. degree is, and must remain, a broad, undifferentiated degree attesting to the acquisition of general knowledge in all fields of medicine and the basic skills requisite for the practice of medicine.
>
> "The guidelines for the admission of students and for the education of students as set forth by the Liaison Committee on Medical Education must continue to govern the decisions of medical school faculties.
>
> "All students of medicine must possess those intellectual, ethical, physical and emotional capabilities required to undertake the full curriculum and to achieve the levels of competence required by the faculty.
>
> "Although certain handicaps or combinations of handicaps will prevent some candidates from meeting these minimum technical standards, individual schools should take all necessary steps to prevent unjustified discrimination against the handicapped."

The accreditation standards of the Liaison Committee on Medical Education (LCME) state that "each school should develop and publish technical standards for the admission of handicapped applicants, in

accordance with legal requirements."[2] The expectation is that each school will write its own policies consistent with its objectives. It is important that schools consult with their legal advisors in developing school policy. The area of law related to disabled persons is evolving rapidly and will be clarified by subsequent court decisions. It is difficult to make precise statements regarding many issues; the meaning of "reasonable accommodation" and "undue burden" will be amplified and clarified as cases come forward in the courts. It is incumbent on schools to develop academic standards and procedures for the assessment of these standards which are consistent with the schools' missions and objectives and to develop policies and procedures about disability which are consistent with institutional missions and objectives. A school's legal counsel should be consulted about policy development and legal liabilities.

THE M.D. DEGREE

The 1979 report of the AAMC's Special Advisory Panel on Technical Standards for Medical School Admission was based on the proposition that the educational objective of a medical school was to prepare undifferentiated students to enter graduate medical training, and that students admitted to a medical school should have the intellectual and physical powers to gain the knowledge, behaviors, and clinical abilities that they would need to pursue any pathway of graduate medical education. These assumptions took note of the increasing involvement with patients during medical training and reflected concern for the safe care that students must render. These propositions are reinforced by numerous statements in the LCME's standards for accreditation which are cited below:[2]

"OBJECTIVES

"An essential objective of a program in medical education leading to the M.D. degree in the United States and Canada must be to meet the standards of accreditation by the LCME so that its graduates will be prepared to enter and complete graduate medical education, to qualify for licensure, to provide competent medical care, and to have the educational background necessary for continued learning.

"EDUCATIONAL PROGRAM

"The curriculum of the program leading to the M.D. degree must be designed to provide a general professional education, recognizing that this alone is insufficient to prepare a graduate for independent, unsupervised practice.

"The medical faculty is responsible for devising a curriculum that permits the student to learn the fundamental principles of medicine, to acquire skills of critical judgment based on evidence and experience, and to develop an ability to use principles and skills wisely in solving problems of health and disease....The faculty should foster in students the ability to learn through self-directed, independent study throughout their professional lives.

"All schools must provide broad-based clinical education programs that equip students with the knowledge, skills, attitudes, and behaviors necessary for further training in the practice of medicine. Instruction and experience in patient care must be provided in both ambulatory and hospital settings. All schools must offer a core curriculum in primary care, utilizing the disciplines or multidisciplinary approaches involved in the delivery of such care.

"Clinical education programs involving patients should include disciplines such as family medicine, internal medicine, obstetrics and gynecology, pediatrics, psychiatry, and surgery. Schools that do not require clinical experience in one or another of these disciplines must

ensure that their students possess the knowledge and clinical abilities to enter any field of graduate medical education. Clinical instruction should cover all organ systems, and must include the important aspects of acute, chronic, continuing, preventive, and rehabilitative care.

"The curriculum must provide grounding in the body of knowledge represented in the disciplines that support the fundamental clinical subjects, for example, diagnostic imaging and clinical pathology. Students must have opportunities to gain knowledge in those content areas that incorporate several disciplines in providing medical care, for example, emergency medicine and the care of the elderly and disabled.

"The final year should complement and supplement the curriculum of the individual student so that each student will acquire appropriate competence in general medical care regardless of subsequent career specialty.

"The faculty of each discipline should set the standards of achievement by students in the study of that discipline....Examinations should measure cognitive learning, mastery of basic clinical skills, and the ability to use data in realistic problem solving. Institutions must develop a system of assessment which assures that students have acquired and can demonstrate on direct observation the core clinical skills and behaviors needed in subsequent medical training.

MEDICAL STUDENTS

"The faculty of each school should develop criteria and procedures for the selection of students, which should be published and available to potential applicants and to their collegiate advisors. Medical schools must strive to select students who possess the intelligence, integrity, and personal and emotional characteristics that are perceived necessary for them to become effective physicians.

"While physical disability should not preclude a student from consideration for admission, each school should develop and publish technical standards for the admission of handicapped applicants, in accordance with legal requirements."

CURRENT LEGAL REQUIREMENTS

The purpose of the ADA, so far as schools are concerned, is to assure a level playing field so that individuals with disabilities can compete with other applicants on the basis of their ability without being eliminated solely because of a disability. While the ADA does not address selective admissions directly, there is nothing in the law that negates the right of a school with a large number of applications for each place to choose those persons who are best qualified. In summary:[3]

- The ADA requires that schools judge persons on the basis of their ability to complete the educational program rather than on their status as disabled persons.
- Persons seeking admission must be able to perform the "essential functions" of the program in spite of the disability.
- "Reasonable accommodation" may be needed and, if so, must be provided. However, fundamental alteration of the nature of the program is not required. What constitutes "reasonable accommodation" is not stated specifically and will be amplified over time

by future court decisions. Schools are not expected to undertake an "undue burden". However, as the courts have examined what might constitute an undue burden, they have tended to take into account the total resources of an institution; thus, they have generally disapproved denying an accommodation solely on the basis of expense.

- The "essential functions" of the educational program are matters for each school to determine. Whatever standard is developed by a school must be applied uniformly to all persons seeking admission and must be consistent with the mission and goals of the institution. In general, courts have supported the right of educational institutions to set educational policies, including admission. To meet the requirement of non-discrimination law, these standards need to be applied uniformly.

- Preadmission inquiry (and prehiring inquiry) as to whether a person is disabled is not permitted, but a school may seek as much information as is needed to make a determination that an individual can perform the "essential functions" of the educational program. A school may be held accountable to defend the necessity of this information. It is not permissible to inquire about past conditions (such as a history of mental illness or substance abuse). It is permissible to ask if the applicant has any condition which would prevent his/her completion of the curriculum. It is permissible to discuss how he/she will complete required portions of the curriculum and to request documentation.

- Each university is required to designate a person to coordinate compliance with the Rehabilitation Act. This may be someone on the main campus who coordinates activity for all schools within the university.

- Disability is defined in the ADA as any person with a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment. The ADA specifically excludes current alcohol or drug abusers and persons with contagious disease or infection who would constitute a direct threat to the health or safety of others.

SCHOOL POLICY ISSUES: ADMISSIONS

"Essential Functions"

School policy is needed to define the "essential functions" of the curriculum. This analysis should encompass both academic and non-academic requirements (the latter often referred to as technical standards) of the school's curriculum. All applicants should be held to the same admission standards, with accommodation as needed for disabled students.

All schools should have express academic standards which define good academic standing, policies governing academic progress and graduation, and the conditions for remediation and counseling. Clarification is needed with respect to how much extra time may be allowed for examinations and what are the criteria for granting extra time. Additionally, schools need to determine how much time can be taken for completion of the M.D. degree. Students deemed unable to meet these standards should not be admitted. **In determining academic standards, an important policy question to consider is: "What portions of the curriculum are essential?" This determination should be**

made with reference to the institutions' educational mission and objectives. Each course and required activity should be evaluated as to its contribution to the level of skill and knowledge required of all students as a prerequisite to the award of the M.D. degree, thatis, is the course or activity legitimately required of all students because of its essential contribution to a necessary skill? The courts have been reluctant to interfere with the educational policy of schools, but schools have the burden of proof to demonstrate that a required course is "essential".

Medical schools need to take a similar path with respect to physical, cognitive and behavioral standards (often called technical standards) which are required for the satisfactory completion of the program and which are a part of the school's academic standards. These standards should refer to desired ends rather than the means to achieve the standard, since a disabled student may be able to achieve the required end using "reasonable accommodation." These standards should represent the minimum physical, cognitive, and behavioral requirements for the satisfactory completion of all aspects of the curriculum and the development of professional attributes required by the faculty of all students at graduation. Important policy questions in this area are:

> "What is the school's position with respect to third-party intermediaries to assist persons with disabilities in performing the requirements of the curriculum?"; "Are there 'essential functions' in which the use of a third party to observe or interpret information compromises the essential function of the physician?" School policy should address essential functions in the following areas:
>
> - The use of motor skills such as palpation, auscultation, percussion and other diagnostic maneuvers.
>
> - The use of sensory skills such as observing demonstrations and experiments in the basic sciences and obtaining a medical history directly from the patient and directly observing a patient's medical condition.
>
> - Communication with patients, physicians, and others on the medical team about a patient's condition, in settings where communication typically is oral, in settings where communication typically is written, and in settings when the time span available for communication is limited.
>
> - Intellectual-conceptual, integrative, and quantitative abilities necessary for problem-solving and diagnosis.
>
> - Activities which have a behavioral and/or social context, including professional responsibility to patients, typical daily workloads, working in an environment which may change rapidly without warning, and/or in unpredictable ways.

Once a school has determined essential functions, both academic and non-academic, it is in a position to select its entering class, choosing from among applicants those persons who best meet the school's academic and technical standards and purposes.

"Reasonable accommodation". The process used by each school should consider the needs for accommodation of each individually. Accommodation amplifies the means for persons with disabilities student to achieve the desired end or standard required of all students. In the admissions process, the burden of proof is on the applicant to demonstrate that he/she can meet the essential

functions of the program. Once admitted, it is the school's responsibility to provide "reasonable accommodations" and, in general, to pay the costs associated with the accommodation. Some accommodations which a school might reasonably be expected to make include course load modification and extended time for the completion of examinations, courses, thesis requirements, and degree(s). Additionally, schools may be asked to provide readers, sign-language interpreters, and tutors. How much accommodation may be too much is a matter which will be tested in the courts. The safety of patients involved in student education is of paramount importance; where public health and safety are at risk, the ADA standard holds that the term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

Access for persons with disabilities to all buildings and facilities is required of all employers as well as all schools. These access accommodations are required regardless of whether a school has disabled students, since the buildings must be accessible for all potential employees and students. Compliance with these barrier-free requirements will necessitate a review of the school's parking, entrances, elevator access to all floors, classroom design, restroom access, library entrances, stacks and seating, social and recreational areas, housing, and administrative offices. When a school has multiple buildings, access between buildings must be reviewed if a student would normally be required to use the facility.

SCHOOL POLICY ISSUES: STUDENT PROMOTION AND RETENTION

The school's promotion and retention policies apply to all students enrolled in the medical school and should be applied consistently. A student who becomes disabled during medical school may require accommodation to achieve the standards required by the faculty for graduation. As with student admission, the accommodations may include additional time for examinations and to complete the degree requirements, readers, and tutors. A leave-of-absence for rehabilitation may be necessary in certain cases. In general, the policy questions to be addressed for student promotion policy are the same as for admission: "What portions of the curriculum must be completed by all students and are therefore essential?"; "What is the school's position with respect to third-party intermediaries who might assist persons with disabilities in performing the requirements of the curriculum?"; "Are there 'essential functions' in which the use of a third party to observe or interpret information comprises the essential function of the physician?"

Schools may request as much information of the student as is needed to make a determination regarding the student's ability to continue satisfactorily. Documentation by a healthcare professional of the presence of a disability is an important initial step. Subsequently, a school would determine the kinds of accommodation that will assist the student in meeting the school's standards for progress and promotion. While the accommodation needed will vary depending on the specific need of the individual, the policies of the school with respect to promotion and retention should be applied uniformly. A student who , even with accommodation, cannot meet the school's standards for promotion and graduation, should not be promoted or awarded a degree. The criteria by which the faculty grant promotion, provide extra time, or permit remediation of unsatisfactory work need to be clearly detailed. Schools need to determine how much time can be taken to complete the M.D. degree.

SCHOOL IMPLEMENTATION: PROCEDURES

The initial steps are for the school's faculty to determine essential functions of the curriculum and to develop a policy statement. Consultation with the school's legal counsel at this stage is important.

The policy statement should be reviewed periodically and published annually in the school's official bulletin and in any separate admission brochure.

Implementation of the policy might be handled by the school's admission committee. Alternatively, a school might consider a group composed of the student affairs dean and several course chairs. Other possibilities exist. But the important step is for the school to identify the person(s) in charge of implementing and interpreting the policy and include this information in publications. The authority(ies) designated to implement and interpret policy should develop detailed, written procedures for this purpose if these have not already been spelled out in the policy statement. Different schools may take different approaches. However, it is important that, once established, the policy and procedures be followed consistently. In developing procedures, consideration should be given to the following areas:

- Communications with applicants and prospective applicants: How and where will the policy and procedures be published? To whom will written and telephone inquiries be directed?

- How and when will applicants be asked to provide information and documentation about their ability to meet the essential functions of the school's curriculum?

- How and when will the admission committee members be informed about appropriate and inappropriate topics for interviews? Who will provide this training and how often will it be done?

- Communications with accepted applicants regarding details of the needed accommodations: At what point will this be initiated and by whom?

- What additional orientation may be needed for an entering student who is disabled? Who will make this determination? Who will implement this activity?

- The school's faculty needs to develop a policy statement which addresses circumstances when a student becomes disabled once in medical school. This policy and the implementing procedures, including the person responsible for implementation, should be published annually in the student handbook and reviewed periodically.

- The university's legal counsel should be consulted from the beginning as the policy statements and implementing procedures are developed.

- Medical school authorities would be well advised to consult with the university's ADA coordinator.

REFERENCES

1. Association of American Medical Colleges. *Report of the Special Advisory Panel on Technical Standards for Medical School Admission.* Washington, D.C.: January 25, 1979.

2. Liaison Committee on Medical Education. *Functions and Structure of a Medical School.* Chicago, Illinois and Washington, D.C., 1991.

3. Public Law 101-336: Americans with Disability Act, July 26, 1990.

APPENDIX

(1) Burgoyne, Robert A.; "The Americans With Disabilities Act": an annotated legal summary.

FULBRIGHT & JAWORSKI
801 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2604

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
NEW YORK
LOS ANGELES
LONDON
ZURICH
HONG KONG

TELEPHONE: 202/662-0200
TELEX: 197471
FACSIMILE: 202/662-4643

WRITER'S DIRECT DIAL NUMBER:
202/662-4513

June 2, 1993

THE AMERICANS WITH DISABILITIES ACT

Robert A. Burgoyne
Jacqueline R. Depew

I. INTRODUCTION

The Americans with Disabilities Act ("ADA") was enacted in July of 1990, with its provisions becoming effective at various dates thereafter. See 42 U.S.C. §§ 12101 et seq. The Department of Justice and the Equal Employment Opportunity Commission have since published guidelines and implementing regulations for the new law. See 28 C.F.R. Part 36 (1992); 29 C.F.R. Part 1630 (1992). While the ADA substantially expands the rights of the disabled, especially in the private sector, it is not meant to supersede any current state or federal anti-discrimination laws that provide equal or greater protection to individuals with disabilities. Thus, any policies and procedures that universities and colleges have developed to comply with such laws as section 504 of the Rehabilitation Act of 1973 ("section 504") or any other state or federal laws should merely be augmented to allow for the more expansive provisions of the ADA. Indeed, in many respects, the ADA is modeled after the Rehabilitation Act, and cases that interpret section 504 will often be relevant in applying the ADA. A few such cases are mentioned below where appropriate.

Title I of the ADA addresses issues of employment. Title II prohibits discrimination by entities engaged in public services. Title III prohibits discrimination in any public accommodation. Title IV concerns telecommunications and Title V contains miscellaneous provisions. Title I of the ADA will affect the employment decisions of colleges and universities, and state institutions may be subject to the provisions contained in Title II. This outline, however, focuses on Title III of the ADA as it applies to the relationship between students and colleges and universities; it does not focus specifically on medical schools. The outline is not intended to provide legal advice, but rather a general outline of certain aspects of Title III. Legal counsel should be sought if and when specific questions arise regarding the ADA.

A list of relevant court cases is provided at the end of this paper, along with a list of articles and other publications of interest.

II. OVERVIEW OF THE ACT

The ADA protects any individual with a physical or mental impairment that substantially limits that person in some major life activity, and any individual who has a history of, or is regarded as having, such an impairment. See 42 U.S.C. § 12102(2). As with section 504 of the Rehabilitation Act, the key components of this definition are: physical or mental impairment; substantially limits and major life activity.

A. Physical or Mental Impairment

In order to fall within the ambit of the ADA, a covered impairment must be some sort of physiological or mental disorder. It does not include simple physical characteristics such as pregnancy or hair color. In addition, with some exceptions, obesity does not qualify as a covered impairment. See 28 C.F.R. § 36.104.

B. Substantially Limits

An impairment substantially limits an individual in a major life activity if the person cannot perform the life activity at all, or if the individual is limited in the condition, manner or duration of that activity. The individual's limitations must be analyzed without regard to any mitigating devices or medicines. See 28 C.F.R. § 36.104.

C. Major Life Activity

The Department of Justice has not specifically defined "major life activity." Instead, it has provided examples of the kind of activities that would be considered "major life activities." These activities include, but are not limited to: walking, seeing, speaking, breathing, learning, working or performing manual tasks. See 28 C.F.R. § 36.104.

A person is protected under the ADA not only if he or she currently has a disability, but also if he or she has a "record" of a disability; that is, if the person had an impairment that he or she no longer has or if an individual was misdiagnosed as having an impairment that the person actually does not have. See 42 U.S.C. § 12102(2)(B). The ADA also extends protection to a person "regarded" as having a disability. See 42 U.S.C. § 12102(2)(C); 28 C.F.R. § 36.104. Thus, the ADA includes within its coverage persons whose impairment has the effect of limiting them in a major life activity only because of the attitudes of others towards the impairment, as well as those who are treated as having an impairment when they actually do not have one. See, e.g., School Board of Nassau County v. Arline, 480 U.S. 273 (1987) (woman with tuberculosis was fired because her employer thought she was contagious; Supreme Court held that woman was protected under section 504 because her impairment

substantially limited her ability to work as a result of the negative reaction of others to her impairment). Finally, the ADA protects a new category of individuals -- those who associate with someone with a disability. See 42 U.S.C. § 12182(b)(4). A college or university may not, therefore, discriminate against someone because he or she associates with someone who has AIDS or because he or she has a dependent with a disability that would be expensive to cover under a university health insurance policy.

Certain conditions are excluded from the definition of "disability" under the ADA: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania and psychoactive substance use disorders resulting from current, illegal use of drugs. See 28 C.F.R. § 36.104 (1992). The ADA likewise does not protect people from discrimination resulting from their current use of illegal drugs. 28 C.F.R. § 36.209. The new law does protect individuals who have a history of drug use, as long as the person no longer uses such drugs. Id.

Under the ADA, colleges and universities are prohibited from discriminating against a qualified person with a disability in all aspects of academic life. This means that colleges and universities must make reasonable modifications to accommodate the known physical or mental disabilities of an otherwise qualified individual. This includes modification to an application for admission which would allow an individual to be considered for admissions; modification to the academic program or to the manner in which an individual may successfully complete the essential functions of the academic program; and modification or adjustment to the campus environment that enables a person with a disability to enjoy the same privileges and benefits that other students enjoy so long as the modification does not change the program's fundamental nature. See 28 C.F.R. §§ 36.302 & 36.303.

A college or university need not, however, make any accommodation that would cause the institution "undue burden." 28 C.F.R. § 36.104. An undue burden is one which imposes "significant difficulty or expense" under the totality of the circumstances. This standard is a subjective, relative one and varies depending on the resources, structure and size of the institution. Id.

A college or university also need not permit an individual to participate in or benefit from its goods, services, facilities, privileges, advantages and accommodations when that individual poses a direct threat to the health and safety of others. 29 C.F.R. § 36.208. A direct threat means "a significant risk to the health or safety of others that cannot be eliminated by modification of policies, practices or procedures, or by the provision of auxiliary aids or services." See 42 U.S.C. § 12182(b)(3). This determination must be based on reasonable judgment and "current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and

whether reasonable modifications of policies, practices or procedures will mitigate the risk." 28 C.F.R. § 36.208(C); see also Arline, 480 U.S. 273 (setting out same factors).[1/]

The "direct threat" test was recently used to justify a university's decision to terminate a dental student who was HIV positive in Doe v. Washington University, 780 F. Supp. 628 (E.D. Mo. 1991). In Doe, the court held that the university's determination that the student posed a real risk of transmitting the AIDS virus through invasive surgery justified its decision that the student was not "otherwise qualified" for dentistry. Id. at 634. More remote risks of transmission, however, may not justify the refusal to admit students with contagious diseases into the medical or other professions. For instance, the court in Doe noted that the university fulfilled its section 504 obligations of reasonable accommodation by offering the student alternatives in medicine that did not involve invasive surgery. Id. More recently, an HHS administrative law judge found that a hospital's refusal to hire an HIV positive pharmacist, unless he agreed to certain restrictions, violated section 504. The judge ordered the hospital to hire the worker or risk losing substantial federal funds. See, e.g., Dennis Hevesi, "Hospital Told to Hire H.I.V. Worker," N. Y. Times, April 23, 1992, at B1. Thus, colleges and universities should individually evaluate the risk of harm that a student with a disability may pose in a particular program.

III. NEW REQUIREMENTS FOR UNIVERSITIES AND COLLEGES

Most colleges and universities are already prohibited from discriminating against individuals with disabilities under section 504. Section 504 prohibits recipients of federal funds from discriminating against handicapped individuals in any of its programs. Because the ADA generally tracks the language, definitions and requirements of section 504, the ADA should not pose many new demands on institutions already subject to section 504. Nonetheless, the impact of the ADA will be felt by most educational institutions.

First, the ADA now prohibits discrimination of individuals with disabilities in the activities of "public accommodations," which include "a nursery, elementary, secondary, undergraduate or post graduate private school, or other place of education." See 42 U.S.C. § 12181(7)(J). Consequently, under Title III of the ADA, even those educational institutions which receive no federal money are now prohibited from discriminating in their programs and activities.

[1/]Whether the direct injury test also encompasses concerns related to the safety of the disabled person is unclear; 28 C.F.R. § 36.301(b), however, seems to allow such a consideration.

Second, the ADA spells out specific examples of what constitutes discrimination in providing facilities, goods, services, programs and transportation systems. Also, as described above, the ADA defines "disability" more comprehensively. Finally, the ADA specifically provides for a private cause of action and allows a successful party to recover his or her attorney's fees. Unlike section 504, however, which likely allows for the recovery of compensatory and punitive damages, see Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992), Title III of the ADA allows only injunctive and declaratory relief and, if the case is prosecuted by the Attorney General, the imposition of fines and, in some cases, the recovery of damages. See 42 U.S.C. § 12188.

The greatest impact that the ADA will have on colleges and universities is the heightened awareness of discrimination against the disabled. Colleges and universities can now expect more attention to be paid to this issue and more demands for accommodation to be made.

IV. SPECIFIC ADMISSIONS ISSUES

A college or university must have a policy in place that prevents discrimination on the basis of disability in the admissions process. Universities and colleges should carefully scrutinize the tests and criteria on which they base admissions in order to make sure that these materials accurately measure an applicant's ability to perform the essential functions of the particular academic program. In addition, colleges and universities may be required to demonstrate that the tests they use for admissions have been validated as a predictor of success in the particular program and that an identified alternate test, which has less of a discriminatory impact, is not available. Admissions officers should also be aware that testing accommodations for certain students with disabilities on standardized admissions tests are reasonable and necessary accommodations and that this, as well as other criteria such as grades and life experiences, should be taken into account when evaluating the applicant. An applicant for the New York bar examination recently filed suit under the ADA because of the failure to provide her with such accommodations. See Rosenthal v. New York State Board of Law Examiners, No. 92 Civ. 1100 (S.D.N.Y. filed Feb. 13, 1992).

As a general rule, colleges and universities may not ask prospective students to identify whether they are disabled persons. It is legal, however, to ask about an individual's disability status on an application as long as the answer is optional and as long as the purpose of the question is to correct past discrimination. It is also legal to require documentation of a disability in the admissions process if the applicant places his or her disability at issue. In addition, once a student has been admitted, a college or university may ask a particular student whether he or she has a disability which may require reasonable accommodation.

A college of university must reasonably accommodate any disabilities of which it is aware. While schools are not legally required to discuss potential needs of accommodation with accepted students, they may want to consider doing so. Cf. Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1380-83 (3rd Cir. 1991) (denying summary judgment to college to claim brought by medical student under section 504 because material issue existed over whether college knew of student's handicap when it refused to make certain seating accommodations for her). In providing reasonable accommodations, a university need not change its fundamental program requirements, and an institution may consider whether the applicant would be able to practice in their field of training. See Southeastern Community College v. Davis, 442 U.S. 397, 413 n.12 (1979) (under Section 504, nursing school was not required to waive clinical requirements for nursing student with serious hearing impairments because such skills were essential part of nursing education; Southeastern's purpose of training persons "who could serve the nursing profession in all customary ways" was a legitimate academic policy in that it "seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast"); Doherty v. Southern College of Optometry, 862 F.2d 570, 574-75 (6th Cir. 1988) (proficiency requirement that tested student's use of instruments was essential to optometry school's program and need not be changed to reasonably accommodate a disabled student). Thus, a student who, by virtue of his or her disability, is unable to perform necessary tasks, with or without reasonable accommodation, is not "otherwise qualified." Cf. Doe v. New York University, 666 F.2d 761, 769, 777 (2nd Cir. 1981) (medical student with mental disorder was not entitled to preliminary injunction requiring her readmission as it was unlikely she could show that she was "otherwise qualified" to practice medicine under section 504; it was appropriate for the University, in determining whether the student was "otherwise qualified," to "be advised of and to take in account [the student's] mental impairment, since it is directly relevant to her qualifications and bears upon her ability to function as a student and doctor, to get along with other persons, and to withstand stress of the type encountered in medical training and practice"). But see Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1386 (10th Cir. 1981) (medical school found to have violated Section 504 by denying a person with multiple sclerosis admission to a psychiatric residency program, where reasons articulated by University were based on incorrection assumptions or inadequate factual grounds; relevant inquiry stated to be whether the applicant's "handicap would preclude him from carrying out the responsibilities involved in the residency program and future patient care, so that the University rightfully excluded him from the program after weighing the implications of his disability").

If certain tasks required for a program are only marginally relevant to the program's purpose, a college or university may have to reasonably accommodate a student with respect to such a requirement. For instance, the First Circuit recently held in Wynne v. Tufts University, 932 F.2d 19 (1st Cir. 1991) that, under Section 504,

a medical school may have to provide a dyslexic student with an essay-type exam rather than a multiple choice format, unless the school could demonstrate that alternate testing forms had been fully considered and rejected for rationally justifiable reasons.

If a college or university refuses admission to a disabled student, it should never try to placate the student by mentioning that it would have been difficult for them to complete the program in any event. Likewise, when explaining to a disabled applicant why he or she has been denied admission, a university should focus on objective criteria and avoid framing the discussion solely in terms of the applicant's disability. See Pushkin v. Regents of the University of Colorado, 658 F.2d at 1382, 1386.

Students with disabilities may not be denied the assistance of special aids in the classroom such as tape recorders or adaptive equipment which enable a student to take full advantage of a program. 28 C.F.R. § 36.303. Colleges and universities may also need to make such "auxiliary aids" available in the library at certain times or to develop an "on-call" system for readers or note takers. Oftentimes the cost of such auxiliary aids may be defrayed by a state or other private or public program. Even if the student does not qualify for such aid, however, the college or university may still need to provide the auxiliary services at no extra cost. Cf. United States v. Board of Trustees for the University of Alabama, 908 F.2d 740, 746 (11th Cir. 1990) (under section 504, auxiliary aids must be provided regardless of student's ability to pay). The regulations give examples of auxiliary aids which might be required under the ADA, but they purposefully do not set out which aids must be used in any particular circumstances. See 28 C.F.R. §§ 36.303(b), 36.309(b)(3); see also 42 U.S.C. § 12102 (defining "auxiliary aids and services" as "includ[ing] (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions").

Other areas for which a college or university may need to make special accommodations are student housing, athletics, health insurance and transportation (for which the ADA has implemented specific requirements). In addition, a college or university should evaluate its student financial aid and career placement programs to insure that they operate in a non-discriminatory manner.

V. ENFORCEMENT OF THE ADA

Two main enforcement mechanisms exist under Title III: a private right of action and enforcement by the Attorney General. An individual who is discriminated against or has reasonable grounds for believing that he or she is about to be subjected to discrimination may bring a case in federal court for injunctive relief. See 42 U.S.C.

§ 12188(a)(2); see also Title II of the 1964 Civil Rights Act (its remedies apply to violations of Title III of the ADA). An individual may also request an order requiring a college or university to provide an auxiliary aid or service; modify its policy, practice, or procedure; provide an alternative method; and make facilities readily accessible and usable by individuals with disabilities. See 42 U.S.C. §§ 12188(b)(2)(A)(ii)-(iii). Title III of the ADA does not entitle a successful litigant to compensatory or punitive damages, however.

In addition to instituting a cause of action in federal court, an individual may file a complaint with the Attorney General who "shall" investigate the alleged violation. See 42 U.S.C. § 12188(b)(1)(A)(i). The Attorney General must also conduct periodic reviews to determine a covered entity's compliance with Title III. Id. If this review, or the investigation of a complaint, leads the Attorney General reasonably to believe that any person or group of persons is engaged in a pattern or practice of discrimination or that any person or group of persons has been discriminated against under Title III and the discrimination involves an issue of general public importance, the Attorney General may commence a civil action in federal court. Id. at § 12188(b)(1)(B). The Attorney General may seek injunctive relief, monetary damages on behalf of the aggrieved individual, and civil penalties of up to $50,000 for the first violation and up to $100,000 for each subsequent violation. See 42 U.S.C. § 12188(b)(2).

R.A.B.
J.R.D.

RELEVANT ARTICLES AND PUBLICATIONS

Equal Employment Opportunity Comm'n, A Technical Assistance Manual of the Employment Provisions (Title I) of the Americans With Disabilities Act (January 1992).*

U.S. Dep't of Justice, The Americans With Disabilities Act: Title III Technical Assistance Manual (1992).*

Brigid Hurley, Note, Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligation Under Section 504 of the Rehabilitation Act, 32 Boston College Law Review 1051 (1991).

Hattie E. Kaufman, Access to Institutions of Higher Education for Students with Disabilities (published by the National Association of College and University Attorneys, Washington, D.C.) (1991).

S.E. Phillips, Testing Condition Accommodations for Disabled Students, 80 Educ. L. Rep. 9 (March 1993).

Kay Rottinghaus & Whitney Wilds, Case Comment, *Wynne v. Tufts University School of Medicine*, 19 Journal of College & University Law 185 (1992).

Frederick Thrasher, The Impact of Titles II and III of the Americans With Disabilities Act of 1990 on Academic and Student Services at Colleges, Universities & Proprietary Schools, *in* Selected Exchange of Legal Information Accessions, 22 NACUA College L. Dig. 257 (June 18, 1992).

---

* The EEOC and Department of Justice manuals are sold by the U.S. Government Printing Office and are well worth purchasing in their entirety.

RELEVANT COURT CASES

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) (an individual with a contagious disease is a "handicapped individual" within the meaning of § 504 of the Rehabilitation Act, and whether the individual is "otherwise qualified" under the Act must be determined on a case-by-case basis based on the nature of the risk, the duration of the risk, the severity of the risk and the probabilities the disease will be transmitted and cause harm).

Southeastern Community College v. Davis, 442 U.S. 397 (1979) (an "otherwise qualified" individual under the Rehabilitation Act is a person who is "able to meet all of the program's requirements in spite of" his or her handicap; an institution is not required to "disregard the disabilities of handicapped individuals or make substantial modifications in their programs to allow disabled persons to participate").

Wynne v. Tufts Univ. School of Medicine, 976 F.2d 791 (1st Cir. 1992) (university's failure to offer a disabled medical student alternative form of multiple-choice exam did not constitute failure to make reasonable accommodation under Section 504 of the Rehabilitation Act where university considered alternatives and made academic judgment that altering the test format "would require substantial program alterations, result in lowering academic standards, and devalue [the university's] end product--highly trained physicians"), cert. denied, 113 S. Ct. 1845 (1993).

Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19 (1st Cir. 1991) (*en banc*) ("If [an] institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation" under the Rehabilitation Act).

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991) (summary judgment was inappropriate because material issue existed over whether medical college knew or reasonably should have known that student was disabled and needed accommodation), on remand, 1991 WL 83113 (E.D. Pa. 1991) (medical college's motion for partial summary judgment was granted precluding plaintiff from obtaining compensatory damages due to her failure to show intentional discrimination).

United States v. Board of Trustees for the Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990) (Rehabilitation Act prohibits a university from denying auxiliary aids to handicapped student on basis that student fails to demonstrate need for financial assistance; a university must also provide auxiliary aids to students in non-degree and non-credit programs).

Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988) (denial of degree because of inability to meet clinical proficiency requirements did not violate Section 504; school did not have to alter those requirements in order to reasonably accommodate student with retinitis pigmentosa).

Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir.) (nursing school violated Section 504 of the Rehabilitation Act by rejecting applicant based on the results of a medical examination which revealed that applicant suffered from Crohn's disease), rev'd, 474 U.S. 936 (1985).

Anderson v. University of Wisconsin, 841 F.2d 737 (7th Cir. 1988) (university did not violate Rehabilitation Act by refusing to readmit for a third time a law student who suffered from alcoholism and failed to meet the minimum grade requirements both semesters in which he was enrolled).

Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (in determining whether medical student with mental disorder was "otherwise qualified," university was entitled to consider whether student's mental impairment would affect her ability to function as a student and a doctor).

Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981) (applicant afflicted with multiple sclerosis who was denied admission to psychiatric residency program was qualified for program apart from his handicap and was granted injunctive relief under Section 504 of the Rehabilitation Act).

Grimard v. Carlston, 567 F.2d 1171 (1st Cir. 1978) (nursing student who fractured and dislocated his ankle was not covered by the Rehabilitation Act and was properly excluded from participating in clinical course for one semester).

Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993) (transfer student with learning disability and Tourette's Syndrome with low GPA and low test scores was not otherwise qualified for admission to regular baccalaureate program under Rehabilitation Act).

D'Amico v. New York State Board of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993) (under the Americans with Disabilities Act visually impaired applicant for state bar examination was entitled to a preliminary injunction requiring Board of Law Examiners to provide all testing accommodations recommended by her physician, absent any medical evidence to rebut physician's medical opinion on nature of disability and applicant's abilities).

Pandazides v. Virginia Board of Education, 804 F. Supp. 794 (E.D. Va. 1992) (teacher who failed state professional licensing exam which measures prospective teacher's ability to understand and use the elements of written or spoken language was not "otherwise qualified" under Rehabilitation Act because she could not perform the essential

functions of a public school teacher; providing the teacher with unlimited time to take the test was not required as a reasonable accommodation because "similar modifications could not be expected in the job of teaching").

United States v. Becker C.P.A. Review, CV-92-2879 (D.D.C. filed Dec. 28, 1992) (complaint filed by the U.S. Department of Justice alleging violation of Title III of the ADA for failing to provide qualified sign language interpreters and/or other appropriate auxiliary aids to hearing impaired students, and seeking compensatory and punitive damages).

Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991) (university did not violate Rehabilitation Act by dismissing dental student from program after it was discovered that student was HIV positive).

Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (preliminary injunction requiring college to provide interpreter for hearing impaired student was appropriate because the student who was otherwise qualified had probable right under Rehabilitation Act to financial assistance for auxiliary aids such as an interpreter).